

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs September 22, 2009

ROLAND R. SMITH v. STATE OF TENNESSEE

Direct Appeal from the Criminal Court for Davidson County
No. 2002-A-600 Steve Dozier, Judge

No. M2008-02196-CCA-R3-CO - Filed February 25, 2010

The Petitioner, Roland R. Smith, was originally indicted for multiple crimes involving a minor victim, including six counts of rape of a child and nine counts of statutory rape. The original indictment was amended, omitting the six counts of rape of a child, and the jury found him guilty of the remaining charged offenses. On direct appeal, this Court reversed and dismissed the charge in one of the Petitioner's statutory rape convictions and reversed and remanded for retrial four of the Petitioner's statutory rape convictions. Upon motion by the State, the trial court subsequently dismissed the four charges of statutory rape that had been remanded by this Court. While the Petitioner's direct appeal was pending, the Petitioner filed a motion to expunge his record of the six counts of rape of a child, which the trial court denied after finding that the Petitioner was statutorily ineligible for the expungement he sought. The Petitioner then filed a petition for writ of certiorari, requesting that the trial court reconsider its order denying his earlier motion. The trial court dismissed the petition, finding that the Petitioner's remedy was to appeal its previous order denying his motion for expungement. The Petitioner filed this appeal contending that he was never made aware of the order denying his motion for expungement and that we should review his petition for writ of certiorari and grant his request for expungement. After a thorough review of the record and applicable authorities, we reverse the judgment of the trial court and remand for entry of an order of expungement of all public records relating to the six counts of rape of a child and five counts of statutory rape.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Reversed
and Remanded**

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and D. KELLY THOMAS, JR., JJ., joined.

Roland R. Smith, Whiteville, Tennessee, pro se.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Matthew Bryant Haskell, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; Pamela Anderson, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Facts

On March 25, 2002, a Davidson County grand jury indicted the Petitioner for six counts of rape of a child, nine counts of statutory rape, and three counts of especially aggravated sexual exploitation of a minor. The indictment was later amended to omit the six counts of rape of a child. A Davidson County jury convicted the Petitioner of the indicted charges, and the trial court sentenced him to an effective sentence of seventeen years. The Petitioner appealed, and this Court reversed and remanded for retrial four of his convictions for statutory rape, and we reversed and dismissed the charge in one of his convictions for statutory rape. *State v. Roland R. Smith*, No. M2004-014570-CCA-R3-CD, 2005 WL 1541874, at *1 (Tenn. Crim. App., at Nashville, June 29, 2005), *perm. app. denied* (Tenn. Dec. 5, 2005). We affirmed the remaining especially aggravated sexual exploitation of a minor and statutory rape convictions. *Id.* We then modified his sentence to fifteen years. *Id.* Upon remand and motion by the State, the trial court dismissed the outstanding four counts of statutory rape.

While his direct appeal was pending, the Petitioner filed a motion seeking to expunge his record of the initially indicted six charges of rape of a child, which the trial court denied on January 15, 2004. While not included in the record, the Petitioner apparently filed a second petition to expunge his record on June 27, 2005. The record does contain several letters written by the Petitioner to his attorney and various members of the appellate court in which the Petitioner sought information about whether his motion to expunge his record was filed and, if so, whether the trial court had ruled on this motion.

In May 2008, the Petitioner filed a petition for common law writ of certiorari asking the trial court to expunge from his record the five counts of statutory rape that had been dismissed and the original six counts of rape of child. The trial court denied the Petitioner's petition for common law writ of certiorari, explaining that it had previously ruled on the expungement issue on January 15, 2004. The trial court further stated that the Petitioner's remedy would have been to appeal that order. Because he failed to do so, the trial court dismissed the petition. The Petitioner asked the trial court to reconsider, stating that prison records indicated that he did not receive any legal mail from the trial court between January 16, 2004, and January 31, 2004. The trial court denied the motion to reconsider, and it is

from this denial that the Petitioner now appeals.

II. Analysis

On appeal, the Petitioner contends that we should review his petition for writ of certiorari and grant his request to have his record expunged. The State contends that we should dismiss the Petitioner's appeal because there is no appeal as of right from a trial court's dismissal of a petition for common law writ of certiorari, and his appeal does not qualify as a petition for a writ of certiorari.

A. Tennessee Rule of Appellate Procedure 3(b)

Initially, we address the State's arguments that the appeal should be dismissed because the Petitioner does not have an appeal as of right from the trial court's order denying the motion for expungement, and that the Petitioner's issue does not qualify for review under the common law writ of certiorari. According to Tennessee Rule of Appellate Procedure Rule 3(b), a Petitioner's ability to appeal as of right is limited to any judgment of conviction entered by a trial court from which an appeal lies to the Supreme Court or Court of Criminal Appeals: (1) on a plea of not guilty; and (2) on a plea of guilty or nolo contendere, if the defendant entered into a plea agreement but explicitly reserved the right to appeal a certified question of law dispositive of the case pursuant to and in compliance with the requirements of Rule 37(b)(2)(i) or (iv) of the Tennessee Rules of Criminal Procedure, or if the defendant seeks review of the sentence and there was no plea agreement concerning the sentence, or if the issues presented for review were not waived as a matter of law by the plea of guilty or nolo contendere and if such issues are apparent from the record of the proceedings already had. The defendant may also appeal as of right from an order denying or revoking probation, and from a final judgment in a criminal contempt, habeas corpus, extradition, or post-conviction proceeding. *See State v. Lane*, 254 S.W.3d 353 (Tenn. 2008) (holding defendant did not have an appeal as of right from a trial court's denial of a motion to modify a condition of probation); *Moody v. State*, 160 S.W.3d 512, 516 (Tenn. 2005) (stating that Rule 3(b) "does not authorize a direct appeal of a dismissal of a motion to correct an illegal sentence"); *State v. Adler*, 92 S.W.3d 397, 401 (Tenn. 2002) (holding the State does not have an appeal as of right under Rule 3(c) from a trial court's order expunging public records). We agree with the State that Tennessee Rule of Appellate Procedure 3(b) does not contemplate an appeal as of right from the denial of an expungement petition. *See* Tenn. R. App. P. 3(b); *see also Adler*, 92 S.W.3d at 403.

In *Adler*, our Supreme Court held that Rule 3 of the Tennessee Rules of Appellate Procedure does not permit either the State or a criminal defendant to appeal as of right an unfavorable ruling regarding an order of expungement. *Adler*, 92 S.W.3d at 403. The Court

went on to review the issue pursuant to the common law writ of certiorari. *Id.* at 401. The Court noted Tennessee Code Annotated section 27-8-101 codifies the common law writ of certiorari and provides:

The writ of certiorari may be granted whenever authorized by law, and also in all cases where an inferior tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction conferred, or is acting illegally, when, in the judgment of the court, there is no other plain, speedy, or adequate remedy. This section does not apply to actions governed by the Tennessee Rules of Appellate Procedure.

T.C.A. § 27-8-101 (2006). The State in *Alder* appealed the trial court’s granting of an order of expungement, arguing that the trial court acted contrary to the law when it granted the defendant’s order of expungement. The Supreme Court held that, because the State alleged the trial court acted without legal authority, it could, pursuant to the common law writ of certiorari, address the trial court’s grant of the defendant’s motion to expunge his record. This Court reached a similar conclusion in *State v. Gerald Gifford*, No. E2006-02500-CCA-R3-CD, 2008 WL 1813105, at *2 (Tenn. Crim. App., at Knoxville, Apr. 23, 2008), *perm. app. denied* (Tenn. Oct. 27, 2008). In *Gifford*, this Court concluded that “a common law writ was proper where the record reveals that the issue presented involves an allegation that the trial court acted without legal authority in refusing expungement and because there is no other ‘plain, speedy, or adequate remedy.’”

The case under submission presents a slightly different procedural history than those presented in *Alder* and *Gifford*. The Petitioner’s attorneys filed a motion for an order of expungement on his behalf, and the trial court denied that motion on January 15, 2004. Correspondence contained in the record shows that the Petitioner repeatedly wrote letters asking his attorneys whether this motion had ever been filed or ruled upon. The Petitioner then filed, a *pro se*, second motion to expunge his record on June 27, 2005. The trial court denied this second motion, finding that the Petitioner’s proper remedy would have been to appeal the denial of his first motion to expunge his record. The Petitioner then filed a petition for common law writ of certiorari, alleging that the trial court acted illegally when it denied his motion to expunge his record.

While the procedural history here is more complex than that presented in *Alder* or *Gifford*, we conclude that the common law writ is proper because the basis of the Petitioner’s allegation is that the trial court acted without legal authority when it denied his motion to expunge his record and because there is no other “plain, speedy, or adequate remedy.” T.C.A. § 27-8-101. Accordingly, we will review the issue raised. *See* T.C.A. § 27-8-101; *Adler*, 92 S.W.3d at 401.

B. Expungement

The indictments sought to be expunged by the Petitioner alleged crimes occurring between August 2001 and January 7, 2002, and include six counts of rape of a child and five counts of statutory rape, one of which was reversed and dismissed by this Court and four of which were reversed and remanded for retrial and thereafter dismissed by the trial court upon motion by the State.

The procedural requirements for the destruction of public records following dismissal or acquittal of criminal charges are codified at Tennessee Code Annotated section 40-32-101, which is commonly known as the expungement statute. On the date of the Petitioner's alleged unlawful conduct, Tennessee Code Annotated section 40-32-101(a)(1) provided as follows:

All public records of a person who has been charged with a misdemeanor or a felony, and which charge has been dismissed, or a no true bill returned by a grand jury, or a verdict of not guilty returned by a jury, and all public records of a person who was arrested and released without being charged, shall, upon petition by that person to the court having jurisdiction in such previous action, be removed and destroyed without cost to such person; however, the cost for destruction of records shall apply where the charge or warrant was dismissed in any court as a result of the successful completion of [a] diversion program . . .; provided, however, that when a defendant in a case has been convicted of any offense or charge, including a lesser included offense or charge, the defendant shall not be entitled to expungement of the records or charges in such case pursuant to this part.

T.C.A. § 40-32-101(a)(1) (2003). In his petition, the Petitioner noted that all the charges for which he sought expungement occurred before the 2003 amendment to Tennessee Code Annotated section 40-32-101(a)(1). On May 22, 2003, this statute was amended by the General Assembly in response to our Supreme Court's decision in *Adler*. In that case, Adler was charged in a single-count indictment for the crime of aggravated neglect of a child under six years of age, a Class A felony, and, following a jury trial, was convicted of the lesser offense of reckless endangerment, a Class A misdemeanor. In accordance with the expungement statute in effect at the time, the defendant sought expungement of all records relating to his Class A felony indictment. Our Supreme Court held that "a defendant who is convicted of a lesser-included offense of the offense sought in the indictment or presentment is entitled to have the record expunged of any greater charge(s) for which the jury finds the defendant not guilty." *Adler*, 92 S.W.3d at 403. This decision was released on December 30, 2002, and on May 22, 2003, Public Chapter 175 was enacted amending the expungement

statute to preclude expungement of the records “when a defendant in a case has been convicted of any offense or charge including a lesser included offense or charge.” T.C.A. § 40-32-101(a)(1).

In a more recent case by this Court, *Gifford*, we addressed the effect of the amended statute on a multi-count indictment. *Gifford*, 2008 WL 1813105, at *4. We concluded that the term “case” did not include an indictment as a whole, holding that it is fundamental that each count of an indictment represents a separate criminal charge, or case, and that a conviction under each count of the indictment requires a separate judgment of conviction. *Id.* We concluded that “a multi-count indictment represents multiple criminal cases.” *Id.*

Applying this reasoning to the case under submission, we first conclude that the Petitioner is entitled to expungement of his record of the six counts of rape of a child for which he was not prosecuted. We conclude that he was not “convicted of any offense or charge, including a lesser included offense or charge” so as to preclude him relief pursuant to the expungement statute because, as stated in *Gifford*, a multi-count indictment represents multiple criminal cases. Therefore, the Petitioner’s conviction on other, separate indictments, does not prevent him from seeking expungement of the six counts of rape of a child for which he was never prosecuted and which were omitted from the subsequent multi-count indictment upon which he was prosecuted.

As for the five counts of statutory rape for which the Petitioner was convicted, but were later dismissed by this Court or the trial court, we note that the plain language of the statute states, “All public records of a person who has been charged with a misdemeanor or a felony, and which charge has been dismissed . . . shall, upon petition by that person to the court having jurisdiction in such previous action, be removed and destroyed without cost to such person.” T.C.A. § 40-32-101(a)(1). The statute does not indicate that a conviction before a dismissal precludes expungement of the conviction. Accordingly, we conclude the Petitioner herein is entitled to expungement of his record of the five counts of statutory rape that were dismissed either by this Court or by the trial court upon motion by the State.

III. Conclusion

Based on the foregoing reasoning and authorities, we reverse the judgment of the trial court. The case is remanded to the trial court for entry of an order of expungement of all public records relating to the six counts of rape of a child and five counts of statutory rape that were dismissed by this Court or by the trial court upon motion by the State.

ROBERT W. WEDEMEYER, JUDGE